

**STATE OF SOUTH CAROLINA
BEFORE THE PUBLIC SERVICE COMMISSION
DOCKET NOS. 2017-207-E; 2017-305-E; 2017-370-E**

In the Matter of: Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent

In the Matter of: Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920

In the Matter of: Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans

**AARP'S CLOSING BRIEF AND
PROPOSED ORDER**

INTRODUCTION

The central and most difficult issue that the Public Service Commission of South Carolina ("Commission" or "PSC") must determine in these three consolidated cases is the **prudency** of South Carolina Electric & Gas Company's ("SCE&G's") construction costs incurred for the V.C. Summer Units 2 and 3 Project ("Project" or "NND Project") prior to the abandonment of those properties. All other pending issues should be set aside until after the Commission arrives at a fair allocation for these costs, and thus reaches a "just and reasonable" resolution of this prudency question.

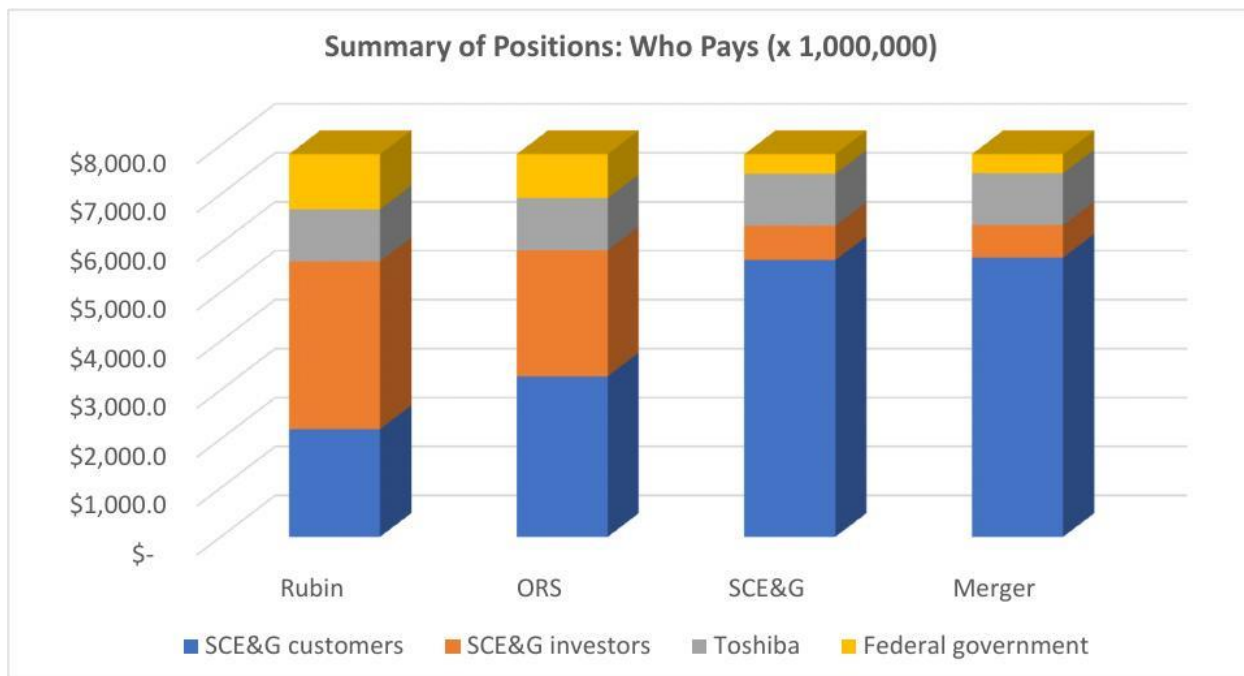
Due to the abandonment of the Project, Section 58-33-280(K) of the Base Load Review Act ("BLRA") is invoked, requiring the Commission to hold a hearing to determine how much of

the Project was prudent. Most parties have interpreted the controlling abandonment standard set out in that subsection to be an inquiry into *when* the Project should have been canceled, based on what SCE&G management *knew* or *should have known* at various stages throughout the construction phase of the Project. In the substantial evidentiary record of these cases, the Commission now has laid before it a spectrum of options regarding how to fairly divvy up this cost.

The prudence question requires this Commission to find the appropriate balance between the utility's captive *consumers* and its *shareholders*, knowing that consumers share none of the blame for the financial fiasco that led to abandonment of the Project, and knowing that this bad investment will never provide used and useful generation for consumers. The competent and substantial evidence on the record supports a significant disallowance of these Project costs as imprudent, and a resulting write off of such costs. The legal analysis underpinning a balanced prudence finding is provided below in AARP's Proposed Findings of Fact and Conclusions of Law. Essentially, the prudence question boils down to this: How should roughly \$5 Billion of bad investment cost be equitably borne between those two groups?

The Joint Applicants are recommending that consumers be forced to pay virtually all of the remaining \$5 Billion in Project costs, if not more. The ORS Optimal Plan would require consumers to ultimately pay \$3.2 Billion in Project costs, as result of SCE&G imprudence and fraud. The Sierra Club, Friends of the Earth, and the South Carolina Energy Users Committee ("SCEUC") each provided testimony supporting a finding that none of these costs should be borne by ratepayers.

By comparison, AARP is recommending that consumers pay no more than the \$2.2 Billion in Project costs that have already been charged through electric rates, and that all further BLRA charges cease after December 31, 2018. This chart graphically illustrates who would pay what, based upon placing these recommendations side-by-side:



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AARP's recommendation is consistent with the testimony of its expert witness Scott J. Rubin, and the evidence of multiple "red flags" or "stop signs" that were known to exist by SCE&G during 2013 and early 2014, and because of the utility's failure to react appropriately to those warning signs during that time frame. As Mr. Rubin testified, SCE&G "ran through those stop signs" and imprudently rang up an unreasonable amount of extra cost that cannot equitably be charged to ratepayers.

A more prudent cancellation date of May 6, 2014 would have prevented the utility from unnecessarily wasting billions of dollars more on the doomed power plant project. AARP asserts that this is the date after which there should have been no doubt that the Project had become uneconomic. May 6, 2014 is nonetheless an extremely generous cutoff date to utility shareholders, considering the overwhelming evidence of construction schedule chaos that was secretly known

¹ Supporting calculations and references are shown in Summary of Scott J. Rubin's Testimony, pp. 3-5. SCE&G and Dominion energy ("Dominion") have offered to the Commission various permutations of their Merger plan into the record throughout the hearing. However, each of these various merger plans would still require consumers to ultimately pay the vast majority of the bad investment associated with the failed Project (nearly \$ 5 Billion), including making captive ratepayers pay a significant portion of imprudently incurred costs.

to SCE&G prior to that date, as well as additional evidence of what the utility should have known by that date.

AARP would be pleased if the Commission disallows all Project costs as imprudent (based on the testimony of Sierra Club's expert witness Dr. Mark Cooper and the expert testimony offered by SCEUC), so that ratepayers bear none of the imprudent cost. However, AARP's recommendation takes a more middle-of-the-road approach, reflecting an equitable sharing of the costs, making shareholders responsible for writing off merely \$ 3.4 Billion of the total \$7.8 Billion in total Project costs (less than half of the total). AARP believes that its recommendation, which would have ratepayers bear \$2.2 Billion of the cost of the Project (with no further BLRA charges on utility bills after December 2018), is the most "just and reasonable" balance and is practical and fair to both sides.

Without ever having any control or say over the management of this Project, SCE&G customers have already paid \$2.2 Billion of the Project cost for absolutely nothing, not a single watt of electricity. Residential consumers now look to the Commission to protect them from any further charges for an abandoned power plant that will neither be "used" nor "useful" in providing them electric service.

AARP commends the Office of Regulatory Staff ("ORS") for bringing the rate Complaint that squarely put this prudence question before the Commission in Docket No. 2017-305-E. AARP also commends the ORS team for the professional way that it has prosecuted its Complaint, carefully laying out substantial and compelling evidence that shows the imprudence and fraud committed by SCE&G upon this Commission, the ORS, and upon its ratepayers. Based upon the overwhelming amount of credible evidence in the record showing SCE&G's imprudence, ORS is recommending that a line be drawn at March 12, 2015, and that all Project costs incurred thereafter be disallowed from electric rates.

ORS focuses heavily upon the utility's acts of omission and the evidence of a managerial coverup regarding an internal cost assessment and an independent review of the Project by Bechtel Corporation² neither of which were revealed to ORS or the Commission during the 2015 BLRA

² See the Bechtel Schedule Assessment Report (Exhibit 119).

Construction Schedule Review docket. However, AARP does not believe that ORS is asking the Commission to go far enough in holding SCE&G accountable for its actions. The problems discovered by Bechtel's review and the other information that SCE&G did not want the Commission to know in 2015 involved warning signs that were known or should have been known *prior to that year*. Thus, it is illogical to cut off the prudence disallowance at the outset of the 2015 BLRA rate review when the warning signs that were being covered up actually originated back in 2013 and early 2014, as the evidence offered by AARP explains. If the 2015 and 2016 BLRA rate review orders are suspect due to fraud by SCE&G, then imprudent activity (or imprudent inactivity) prior to those rate reviews must be reviewed anew. The last previous review of the Project construction schedules by the Commission untainted by fraud occurred in a 2012 BLRA case.³

AARP offered into the record of these cases the expert testimony of Scott J. Rubin, a utility expert with over 35 years of experience, including significant experience with regulatory cases involving troubled nuclear power plants.⁴ Mr. Rubin's testimony explains numerous clear warning signs were known by SCGE management during 2013 and 2014. He testifies that those warning signs should have led to a prudent decision by the utility to abandon the Project much sooner than 2015. By *at least May 2014*, a prudent utility would have determined that the Project had become uneconomic and taken actions to stop the "bleeding". AARP believes that it would be arbitrary and unfair for the Commission to make ratepayers responsible for the unnecessary extra cost incurred between May 2014 and March 2015. The difference between a prudent utility that would have stopped the Project in May 2014 and the management of the utility stopping the Project in March 2015 would have resulted in additional savings of *over a billion dollars*. As explained below, the significant construction problems outlined in the Bechtel report were present and knowable by SCE&G executives much earlier than 2015, and thus the ORS Optimal Plan does not go far enough to protect consumers from the utility's imprudence by recommending a prudence cutoff date no sooner than March 12, 2015.

³ Docket No. 2012-203-E.

⁴ See Mr. Rubin's Direct Responsive Testimony (pp. 2-3) and Appendix A [The attachments to Mr. Rubin's pre-filed testimony are designated as Exhibit 81].

DISCUSSION OF THE EVIDENCE OF IMPRUDENCE

AARP expert witness Scott J. Rubin testified that SCE&G ignored numerous warning signs during 2013 and early 2014 that the Project should have been canceled by at least early 2014.⁵ Among other evidence, Mr. Rubin pointed out two major red flags that should have convinced SCE&G that the Project was ultimately doomed:

1. A May 6, 2014 letter from then-CEOs Lonnie Carter and Kevin Marsh to the Consortium CEOs detailing many issues associated with the Project that had been occurring for several years.⁶, and
2. The fact that when Santee Cooper had attempted to find another utility buyer for a portion of the project, they could not. A 2013 memo revealed that all other responding utilities thought the cost for the Project was too high, that the benefits were too small, and that the risks were too great.⁷

The May 6, 2014 letter from Santee Cooper CEO Lonnie Carter and SCANA CEO Kevin Marsh to the Consortium CEOs mentioned numerous costly delays that had haunted the NND Project during the preceding years. According to the letter, as early as 2011, one of the critical contractors, Shaw Modular Solutions (“SMS”), was seriously behind schedule on the construction of critical components for the NND Project, particularly the auxiliary building and fuel handling area that sits next to the containment vessel, known as the “CA-20 module.” The CA-20 module originally was scheduled for completion in November 2011.⁸ By June 2011, it was clear that SMS’s deficiencies would make that date impossible to meet. SMS consistently failed to make deliveries promised leading up to and in June 2011.

The Nuclear Regulatory Commission (“NRC”) then found that SMS’s quality assurance program was deficient.⁹ This led to pushing out the NND Project’s schedule by more than a year,

⁵ Scott J. Rubin prepared Direct Responsive Testimony pre-filed on September 18, 2018 and prepared Surrebuttal Testimony pre-filed on October 29, 2018. Mr. Rubin testified live at the hearing on November 12, 2018.

⁶ Rubin Direct Responsive Testimony, Exhibit SJR-1 (Hearing Exhibit 81).

⁷ See Rubin prepared Direct Responsive Testimony (pp. 13-17).

⁸ Exhibit SJR-1 (Hearing Exhibit 81), p. 3.

⁹ *Id.*

with a new CA-20 completion date set for January 2013.¹⁰ “By July 7, 2012,” the CEOs wrote, however, “only 21 of 72 CA-20 sub-modules had been delivered to the site.”¹¹ By September 2012, according to the letter, “at least thirty of the milestone dates had already come and gone without completion of the associated milestone event. By that time, only 31 of the 72 sub-modules for CA-20 had been delivered to the site,” even though the entire module was supposed to be complete in less than four months (January 19, 2013).¹²

In October 2012, the NRC conducted a follow-up inspection and again found that SMS had not come into compliance with safety and quality assurance requirements.¹³ Indeed, around that time, the NRC warned that SMS employees were being punished for raising safety concerns. At this point (late 2012), it was clear that the January 19, 2013, date for completion of the module would not be met. Indeed, by March 2013 – two months after the entire module was supposed to be complete – “only 40 of the 72 sub-modules for CA-20 had been received.”¹⁴ That led to a further nine-month delay in the project schedule, with a targeted CA-20 completion date of October 31, 2013.¹⁵

The other major red flag that should have gotten the attention of SCE&G management was Santee Cooper’s attempt to sell a portion of its 45% share in the NND Project beginning in 2011 and continuing through 2012 and into 2013. Santee Cooper was trying to sell more than half of its interest in the Project. It contacted numerous other utilities and could not find a buyer. That is, it was unable to find another utility that was willing to assume the risk of even a small portion of the Project. Ultimately, in January 2014, it was able to sell just a 5% interest in the Project back to SCE&G (which already owned 55% of the NND Project), but SCE&G only agreed to buy it upon completion and commercial operation of the Project. That is, even SCE&G was unwilling to commit to any more construction risk for the NND Project.¹⁶

¹⁰ *Id.*, p. 5.

¹¹ *Id.*, p. 4.

¹² *Id.*, p. 5.

¹³ *Id.*, p. 6.

¹⁴ *Id.*

¹⁵ *Id.*, p. 7.

¹⁶ Rubin Direct, pp. 13-14.

This may be the most compelling evidence of what a prudent utility would do at the time: numerous other utilities in the same region of the country, with the same general knowledge, had an opportunity to buy into the NND Project during the 2011-2013 timeframe, but declined to invest anything in it. That lack of interest should have provided a clear indication to a prudent utility that the Project was not economical and that it was not prudent to invest any more capital into it.¹⁷

In developing its efforts to try to sell a portion of the NND Project, Santee Cooper retained an outside consultant to evaluate the potential risks, costs, and benefits of ownership, and to help make the case to a prospective purchaser. That consultant, Howard Axelrod, had consulted with Santee Cooper for many years, including at the very start of the NND Project in 2005. On March 11, 2013, Dr. Axelrod drafted a memorandum to Santee Cooper that summarized Santee Cooper's attempts to divest itself of a portion of the Project.¹⁸ Dr. Axelrod summarizes: "While several entities contacted indicated an interest to further pursue its investigation of the VCS [V.C. Summer] offering, to date, only Duke Energy is in active negotiations with Santee Cooper with regards to the direct sale of VCS 2 & 3 assets. No other utility that was approached by Santee Cooper has indicated an interest in either an outright asset purchase or the execution of a long term PPA [power purchase agreement]."¹⁹ Dr. Axelrod then concluded that "until VCS construction is complete, both plants are operational, and all costs are known with a high degree of certainty, it is unlikely that any utility, albeit with few exceptions, would likely entertain such an asset acquisition unless the offering was significantly discounted to reflect the risks and uncertainties associated with a \$10 billion ongoing project." The exceptions listed in a footnote were Duke and the Tennessee Valley Authority ("TVA"). TVA already had rejected any attempt to buy into the NND Project and Duke withdrew from negotiations in early 2014.²⁰ Dr. Axelrod explained the reasons for his conclusion, writing: "annual revenue requirements for VCS as measured by its unit costs will be higher than currently available alternative sources of generation including a new combined cycle gas turbine. In order for Santee to offer a competitively priced PPA for VCS would require, for a period of time, a measurable 'discount' relative to VCS's embedded costs. Depending upon

¹⁷ *Id.*, p. 15.

¹⁸ Memorandum from Howard Axelrod of Energy Strategies Inc. to Sylleste Davis of Santee Cooper, Summary. Report on Energy Strategy's VCS Marketing Activities ("Axelrod Memo") (Mar. 11, 2013), a copy of which is attached as Exhibit SJR-2 to Mr. Rubin's Direct (Hearing Exhibit 81).

¹⁹ *Id.*, pp. 2-3.

²⁰ Rubin Direct, p. 15.

the forecasted assumptions, it could take *over ten years* before VCS's annualized costs are below competitive prices in the Southeast."²¹

The Axelrod memorandum continued to explain the economics of the NND Project as compared to a reasonably available alternative, combined cycle gas turbines ("CCGT") fueled by natural gas. Dr. Axelrod stated that "there is a definite economic advantage to CCGT over nuclear measured in both annual levelized unit costs and net present value (NPPV) of life cycle revenue requirements. The capital cost of the CCGT is a quarter of a nuclear plant, the time to plan through construction is also one quarter, and a reasonably economical size can be as low as 300 MW to better match load growth. My study shows that under these conditions, there is an 80%+ chance that even under a range of conditions the NPPV of a CCGT will be less than that of a new nuclear plant."²²

Dr. Axelrod's notes summarized other utilities' positions and concerns, including the following:

- One utility evaluated nuclear but "was concerned over capital intensity and impact on balance sheet." Instead it will build or buy CCGT capacity.²³
- A sale to a utility in the PJM Interconnection would be impractical because "peak hour clearing prices averaged below \$60/MWH" in November and August. "Off peak prices averaged below \$30/MWH."²⁴
- Another utility said the price "was just too high."²⁵

The Axelrod Memorandum also emphasizes that, even if the NND Project and a new CCGT were economically equivalent (which they were not), "the profits from a nuclear plant would be between 5 to 8 times greater than that of a CCGT" because of the capital intensity of a new nuclear plant. Dr. Axelrod thought this could "offer sizable contributions to earnings for an investor-owned

²¹ Axelrod Memorandum, pp. 2-3 (emphasis added).

²² *Id.*, p. 5 (emphases added).

²³ *Id.*, p. 11.

²⁴ *Id.*, p. 12.

²⁵ *Id.*, p. 14.

utility.”²⁶ This explains a possible motive for why SCE&G management chose to ignore the dire warning signs.

There can be little doubt that by March 2013, and the months leading up to that point, numerous utilities had rejected the NND Project because it was not economically viable or not consistent with their provision of low-cost service to customers. Even though Dr. Axelrod tweaked various assumptions to try to show that nuclear power could be cost competitive with natural gas, Santee Cooper did not find any utilities that agreed. Faced with this information in March 2013 (when the NND Project was less than 50% complete), and coupled with the significant construction delays and deficiencies that still had not been remedied, it is the opinion of AARP expert Scott Rubin that a prudent utility would have declined to spend more money on the Project.²⁷

Santee Cooper’s consultant, Dr. Axelrod, produced another study on August 19, 2013.²⁸ While that study (as did his others) tries to paint a rosy picture for the future of nuclear power, his actual findings are quite telling and should have led a reasonable and prudent utility to abandon construction of the NND Project. Specifically, Dr. Axelrod concluded that even with a projection of significantly increasing natural gas prices, the levelized cost of a new advanced CCGT averaged \$65.6 per MWh, while the likely levelized cost for an advanced nuclear plant like the NND Project was nearly double at \$108.4 per MWh.²⁹ This confirms Dr. Axelrod’s findings from March 2013 that a new nuclear plant would be about twice as expensive as a natural gas CCGT. Further, he found that under expected conditions, there was less than a 12% chance that nuclear would end up saving consumers money as compared to CCGT. Moreover, the likely savings from CCGT averaged more than \$1 billion (and in some cases rose to as much as \$7 billion), while the most beneficial case for nuclear (less than a 1% chance of occurring) would save consumers less than \$0.3 billion over its life compared to CCGT.³⁰

²⁶ *Id.*, p. 3 (emphasis added).

²⁷ Rubin Direct, p. 17.

²⁸ Howard Axelrod, “A Case Study of Economic Cost and Risks Associated with Advance Nuclear Generation and Combined Cycle Gas Turbines” (Aug. 19, 2013), attached to Rubin Direct as Exhibit SJR-11 (Hearing Exhibit 81).

²⁹ *Id.*, p. 5.

³⁰ *Id.*, p. 9.

Importantly, Dr. Axelrod's August 2013 analysis also found that even under "highly favorable conditions, annual costs for nuclear will likely exceed CCGT costs for a number of years. While consumers may benefit from nuclear over time, the crossover point [the point where nuclear becomes less expensive than CCGT] could be anywhere from 15 to 30 years. The point of payback [the point where there is a cumulative net benefit from nuclear] could range from 35-50 more years."³¹ In other words, under the most favorable assumptions for the NND Project, consumers would be worse off each year for at least the next 15 to 30 years, and would be worse off cumulatively for between 35 and 50 years. And that is the *best case* that Dr. Axelrod could come up with for the NND Project versus CCGT (in 2013).³² A prudent utility (which wasn't blinded to simple economics by the BLRA and by an opportunity to make considerable earnings off of captive customers) would have decided that it was time to stop throwing good money after bad and cancel the NND Project, thereby saving billions of dollars.

On August 23, 2013, the President and CEO of Santee Cooper sent a letter to the Chairman and CEO of SCE&G.³³ In that letter, Santee Cooper outlined the cause of the significant construction delays, exhibited concerns about the contractors responsible, and concluded that the construction consortium's "inability to fulfill their contractual commitments in a timely manner places the project's future in danger." Some of these concerns were addressed in allowable *ex parte* briefings held during this timeframe.³⁴ By 2013, we now know that there was no official construction schedule and ORS witness Anthony James testified that SCE&G's omissions to the regulators regarding the Bechtel report began in 2014.³⁵

Thanks to whistleblowers Kenneth Browne and Carlette Walker, both former SCE&G managerial employees in the NND Business and Finance group, who offered testimony (*at their own expense*) regarding their time at SCEG working on the Project, we now know that several other attempts to mislead the regulators and the public were also occurring during the 2013-2014

³¹ *Id.*, p. 21 (emphasis added).

³² Rubin direct, pp. 20-22.

³³ Attached as Exhibit SJR-12 to Rubin Direct (Hearing Exhibit 81).

³⁴ See Allowable *Ex Parte* Briefings held September 9, 2011, June 26, 2013, and February 26, 2014. Transcripts available at <https://psc.sc.gov/allowable-ex-parte-briefings> (accessed December 7, 2018)

³⁵ See Transcript, November 7, 2018.

timeframe.³⁶ Both Mr. Browne and Ms. Walker testified the Consortium's estimate at completion ("EAC") was significantly less than the EAC the NND Business and Finance group calculated. Mr. Browne testified his team's EAC was rejected by SCEG's senior management, who insisted on using the EAC the Consortium provided.³⁷ Mr. Browne testified the Company's public representation that the Project was "doing well" was a front; that the construction progress was actually extremely poor and the projected cost overruns were substantial.

ORS witness Gary Jones, P.E., testified regarding the prudence of the costs incurred by SCEG. Mr. Jones testified costs incurred after March 12, 2015 were imprudent and should be disallowed.³⁸ Mr. Jones testified the revised rate increases granted under BLRA review cases in 2015 and 2016 should be rolled back and amounts collected for these rate increases should be refunded to retail customers. Mr. Jones testified that SCEG failed to fully disclose information required by statute to ORS and to the Commission, and the Company was intentionally misleading and deceptive with regard to this material information.³⁹ Mr. Jones cited two major findings that support the March 12, 2015 date: (1) the Company's failure to disclose its plans to have a thorough, independent assessment conducted into the status of the project and identifying major issues that were contributing to the delays and (2) the Company's intentional failure to disclose its complete lack of trust in the schedule and costs provided in its March 12, 2015 petition.⁴⁰

Mr. Jones testified that had he been aware of the independent assessment done by the Bechtel Corporation ("Bechtel") and Bechtel's findings, the settlement reached with ORS in 2015⁴¹ would have been vastly different and it might have resulted in the cancellation or abandonment of the Project at that time. Through discovery in this proceeding, Mr. Jones testified that he has now learned that SCEG had little confidence in the Consortium's construction schedule, even though they failed to express this concern with the ORS at the time. Not only did the Company fail to disclose that Bechtel would be conducting an assessment on the project, Mr. Jones testified that after his colleague recognized Bechtel personnel on site and questioned the Company about their presence, the Company merely stated that nothing new had been found and there would

³⁶ See Transcript, November 27, 2018.

³⁷ *Id.*

³⁸ Direct Responsive Testimony of Gary Jones.

³⁹ *Id.*, pp. 4-5.

⁴⁰ *Id.* pp. 18-32.

⁴¹ Settlement between SCE&G and ORS in 2015 BLRA review case.

be no written report. Mr. Jones testified the dates in Bechtel's assessment were two to three years beyond what was presented to the Commission.

AARP agrees that SCE&G's attempts to hide the Bechtel report from the regulators and from the public are extremely significant. Moreover, AARP believes that it was imprudent for SCE&G to delay the retention of an independent industry expert such as the Bechtel Corporation so long. At hearing, AARP offered a copy of a recommendation contained within a report from the Institute of Nuclear Power Operations ("INPO") report ("INPO Report"), issued July 2, 2013⁴², recommending an outside evaluation of the likely schedule and cost of the project by independent industry experts which, *had SCE&G followed this advice on a timely basis*, would likely have led to cancellation of the Project.⁴³ Instead, SCE&G waited **15 months later** to get Bechtel Corporation under contract to perform that independent review of the Project.⁴⁴ No witness could explain the reason for such a long delay. Had SCE&G promptly followed the recommendation of the INPO, then the utility would have had the benefit of Bechtel's analysis well over a year earlier. And then if the utility had been behaving in a prudent manner, it could have taken steps to correct the identified problems or to cancel the Project at an earlier date, saving over a billion dollars.

DISCUSSION OF MERGER ISSUES

Only after the prudency question has been answered in a just and reasonable manner, should the Commission address the issues surrounding the Dominion-SCE&G merger proposal in Docket No. 2017-370-E. No resolution of the merger application can be fair to consumers if it fails to incorporate an equitable sharing of the costs associated with the abandoned Project. Any merger plan that requires customers to pay the lion's share of Project costs would be unjust, unreasonable, and harmful to the public interest under the standard set out in S.C. Code Ann. § 58-27-1300.

While SCE&G has stated that it does not consider the merger Application to be a general rate proceeding, the Commission's decisions must always conform to the overriding legal

⁴² Hearing Exhibit 18.

⁴³ See Tr. Vol. 2, 344:5-20.

⁴⁴ See AARP cross-examination of Gary Jones. (Not to mention that when SCE&G finally got around to contracting with Bechtel, it chose a roundabout way to hire the firm, using outside counsel to pay for the review, with the goal of hiding the results of the Bechtel review.)

responsibility to ensure “just and reasonable” rates. S.C. Code Ann. § 58-3-140. Thus, the Commission must give due consideration to the Company’s total revenue requirements and review the operating revenues and operating expenses of SCE&G to establish adequate and reasonable levels of revenues and expenses and consider the impact of, and the appropriate conditions to place upon, the proposed Merger. The Commission’s decisions must ultimately take the overall economic impact of any merger proposal into proper account, rather than focus merely upon one item or component of ratemaking in isolation.

AARP’S PROPOSED ORDER

Intervenor AARP hereby offers to the Commission the following findings of fact and conclusions of law for inclusion in its final order consistent with the evidence taken into the record during the multiple days of hearing held during November 2018. AARP also urges the Commission to recall and consider the testimony of the numerous individual customers given during the three evening hearings conducted in October 2018, as it contemplates its decision in this matter.

AARP urges the Commission to adopt the procedural history and findings as put forth in ORS’ Proposed Order, except when such findings conflict with the following recommended findings.

A. Proposed Findings of Fact

This Commission finds that SCE&G’s decision to continue construction of the NND Project beyond May 6, 2014⁴⁵ was **imprudent** considering the information available to SCE&G at that time, as well as information that the utility should have known at that time. It would be **unjust and unreasonable** to charge captive customers for Project costs incurred after that date. A disallowance of \$3,428,700,000 shall be made to reflect the imprudent actions of the utility.

⁴⁵ Date of letter from Kevin Marsh and Lonnie Carter to CB&I and Westinghouse CEOs detailing ongoing construction problems.

In addition, it would be unjust and unreasonable to allow further BLRA charges to be assessed to SCE&G electric ratepayers after December 31, 2018 for power plants costs that are not used and useful to provide electric service to customers.

These findings strike the proper just and reasonable balance between ratepayers and shareholders as it relates to the failed and abandoned NND Project.

None of the merger plans proposed by SCE&G and Dominion Energy strike the proper just and reasonable balance between ratepayers and shareholders as it relates to the failed and abandoned NND Project, and thus must be rejected as harmful to the ratepaying public, who would be forced to pay billions of dollars for an asset that will never provide any customer benefit. These merger applicants are urged to return to the bargaining table and there assess whether, and under what conditions, that merger may proceed in a way that adequately protects customers.

B. Proposed Conclusions of Law

A key U.S. Supreme Court decision that establishes the framework for traditional utility regulation is *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), which involved disallowed costs associated with the cancellation of nuclear power plants by two utilities in Pennsylvania. Briefly, the U.S. Supreme Court unanimously upheld the Pennsylvania Supreme Court's decision that applied a statutory "used and useful" principle to disallow cancelled plant costs from the utility's rate base. The Court emphasized that a constitutional taking of utility property would occur only if the net effect of a rate order were so low as to confiscate the utility's property. Specifically, the Court summarized the constitutional standard as follows:

The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896) . . . *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level").⁴⁶

⁴⁶ *Duquesne Light Co. v. Barasch*, 488 U.S. 299 at 307-308 (1989).

The Supreme Court also specifically rejected any particular ratemaking methodology, as being constitutionally required. On this issue, the Court held:

The adoption of a single theory of valuation as a constitutional requirement would be inconsistent with the view of the Constitution this Court has taken since *Hope Natural Gas*, *supra*. As demonstrated in *Wisconsin v. FPC*, circumstances may favor the use of one ratemaking procedure over another. The designation of a single theory of ratemaking as a constitutional requirement would unnecessarily foreclose alternatives which could benefit both consumers and investors. The Constitution within broad limits leaves the States free to decide what ratesetting methodology best meets their needs in balancing the interests of the utility and the public.⁴⁷

Thus, the Supreme Court has given state utility commissions wide latitude to develop ratemaking mechanisms and approaches that best meet the needs of the particular circumstances they face. The Pennsylvania legislature concluded that an appropriate result was to protect consumers from paying anything for plant investments that never provided service to the public. In other cases, the appropriate result has been to have consumers pay some of the costs of investments that did not serve the public but require investors to bear a significant portion of the failure. Such is the judgment of this Commission in the case at hand regarding the failed and abandoned NND Project.

In reviewing the legal question of prudence, the Commission must address the Base Load Review Act. "The purpose of the Base Load Review Act (BLRA) is to provide for the recovery of the *prudently incurred* costs associated with new base load plants when constructed by investor-owned electrical utilities, while at the same time protecting customers of investor-owned electrical utilities from responsibility for imprudent financial obligations or costs."⁴⁸

SCE&G's decision to continue construction of the NND Project after May 6, 2014 was imprudent under any of the potentially applicable definitions of prudence. Prior to the enactment of Act 258 in July of 2018, the BLRA did not expressly define the terms "prudent" or "imprudent". Generally, words used in a statute must be given their ordinary meaning.⁴⁹ However, in some

⁴⁷ *Id.*, 488 U.S. at 316 (footnote omitted).

⁴⁸ *S.C. Energy Users Comm.*, 410 S.C. 348, 354, 764 S.E.2d 913, 916 (2014). [emphasis added].

⁴⁹ *Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012).

situations a statutory amendment, such as Act 258, may be interpreted as clarifying original legislative intent.⁵⁰

Here, the ordinary meaning of the terms “prudent” and “imprudent” and the definitions given to those terms by Act 258 are not inconsistent. Prudent ordinarily means “circumspect or judicious in one’s dealings; cautious”.⁵¹ A prudent person “acts sensibly, does things without serious delay, and takes proper but not excessive precautions”.⁵² Act 258 defines prudence and imprudence with respect to the presence, or lack, of “caution, care, or diligence” and action within a timely manner.⁵³ Act 258 does not alter the ordinary meaning of these terms, rather, it clarifies them and applies them in the context of the BLRA.

However, regardless of whether we defined prudence according to Act 258’s definitions or relied upon its ordinary meaning, and in light of the similarities between those alternatives, the result would be the same. For the reasons stated above, SCE&G acted imprudently when it failed to stop construction on the NND Project during 2013 and early 2014.

The BLRA permits rate recovery of capital costs and AFUDC even where construction of the base load plant is ultimately abandoned. However, in order to recover these costs through rates, the utility bears the burden of proving, by a preponderance of the evidence, that the decision to abandon construction was prudent. Cost recovery may be disallowed to the extent the utility failed to anticipate or avoid imprudent costs under S.C. Code Ann. § 58-33-280(K). Here, because we find that SCE&G’s decision to continue construction of the NND project after May 6, 2014 was imprudent, the costs incurred after that date must be disallowed.

SCE&G has argued that costs incurred pursuant to initial or revised base load review orders may not subsequently be disallowed and that the parties to these proceedings are collaterally estopped from seeking disallowance of these costs.⁵⁴ SCE&G’s position is, essentially, that it could not have acted imprudently with respect to the NND project *as a matter of law* because this Commission’s 2009 and subsequent base load review orders shielded the NND project from

⁵⁰ Duvall v. South Carolina Budget and Control Bd., 377 S.C. 36, 46, 659 S.E.2d 125, 130 (2008).

⁵¹ Black’s Law Dictionary (8th ed., 2005)

⁵² *Id.*

⁵³ S.C. Code Ann. § 58-33-220(23) and (24) (2018).

⁵⁴ See Joint Appl. Mot. for Decl. Rulings and Mot. *in Limine* filed Oct. 19, 2018 (Dkt. 279153).

prudency review after 2009. However, SCE&G's position contradicts the plan language of the BLRA:

Where a plant is abandoned after a base load review order approving rate recovery has been issued, the capital costs and AFUDC related to the plant shall nonetheless be recoverable under this article provided that the utility shall bear the burden of proving by a preponderance of the evidence that the decision to abandon construction of the plant was prudent. Without limiting the effect of Section 58-33-275(A), recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs.⁵⁵

Thus, the BLRA clearly permits disallowance of imprudently-incurred costs which the utility failed to anticipate, avoid, or minimize and places the burden on the utility to show that the decision to abandon construction was prudent.

SCE&G argues that Section 58-33-275(A) requires this Commission to “exclude all evidence and testimony concerning the need for SCE&G to conduct prudency reviews of the NND project after 2009.” (Dkt. 279153, p. 22-23). However, this Section provides that a base load review order:

. . . shall constitute a final and binding determination that a plant is used and useful for utility purposes, and that its capital costs are prudent utility costs and expenses and are properly included in rates **so long as** the plant is constructed or is being constructed within the parameters of: (1) the approved construction schedule including contingencies; and (2) the approved capital costs estimates including specified contingencies.⁵⁶

The phrase “so long as” limits the application of Section 58-33-275(A) to situations where (1) the plant is “constructed or being constructed” (2) within specified parameters.⁵⁷ Moreover, there is overwhelming evidence that SCE&G knew it would not meet the schedule and cost parameters established by this Commission, but it willfully and fraudulently failed to disclose that information

⁵⁵ S.C. Code Ann. § 58-33-280(K).

⁵⁶ S.C. Code Ann. § 58-33-275(A) (emphasis added).

⁵⁷ See South Carolina Elect. & Gas Co. v. Randall, CA No. 3:18-cv-01795-JMC (D.S.C. August 6, 2018) (denying SCE&G's motion for preliminary injunction).

to the Commission. As a result, we find that this Commission's prior base load review orders do not constitute final and binding prudence determinations.

Thus, pursuant to Section 58-33-280(K), SCE&G bears the burden of proving that its decision to abandon construction of the NND project was prudent and that any imprudently-incurred costs which the utility failed to anticipate, avoid, or minimize are subject to disallowance. For the reasons stated above, we find that SCE&G failed to anticipate, avoid, or minimize NND Project costs incurred after May 6, 2014, because continuing construction of the NND project was imprudent after that date. Therefore, such costs are disallowed, and no further BLRA charges shall be permitted on customer electric bills after December 31, 2018.

CONCLUSION

For the final order to be issued by the Commission in these consolidated cases to fall within a zone of reasonableness, that order must not require customers to swallow the lion's share of the Project costs for a useless power plant. Instead, the Commission should order a prudence disallowance which results in a more equitable sharing of the costs between ratepayers and the shareholders for the ill-fated NND Project. Those SCE&G shareholders hired the managers who willfully withheld material information from the Commission, unconscionably delayed obtaining an independent assessment of the project (Bechtel Report), and made the mistake to continue construction on the Project well beyond the point of imprudence. , Shareholders, therefore, deserve to share at least as much of the financial pain as the ratepayers, who bear no responsibility for those bad decisions, and many of whom struggle each month to pay their household bills.

After the Commission applies a prudency finding that fairly shares the burden of paying for the mistakes of SCE&G management between its shareholders and its captive customers, it will then be up to the merger applicants Dominion Energy and SCE&G to either accept that decision as part of its merger proposal, or to return to the negotiating table and attempt to reach a new merger agreement that truly falls within the zone of reasonableness.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 2018 a copy of the foregoing was served upon all parties to these consolidated dockets by electronic mail.

s/ Adam Protheroe